FOR ARGUMENT

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No. 04-1544

Supreme Court, U.S.
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In The

Supreme Court of the United States

VICKIE LYNN MARSHALL,

Petitioner,

v.

E. PIERCE MARSHALL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE NATIONAL COLLEGE OF PROBATE JUDGES IN SUPPORT OF RESPONDENT

JAMES R. WADE
WADE ASH WOODS HILL & FARLEY, P.C.
360 South Monroe Street, #400
Denver, Colorado 80209
303-321-0653

Attorney for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
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INTEREST OF THE *AMICUS*

This *Amicus* Brief is submitted by the National College of Probate Judges in support of the Respondent. It is the position of the College that the decision of the Ninth Circuit Court of Appeals should be affirmed. Pursuant to Rule 37.3(a), all parties have consented to the filing of this brief.[1]

The National College of Probate Judges (hereafter "NCPJ" or the "College") was founded in 1968. Its major purposes are: to promote efficient, fair and just judicial administration in the probate courts and to provide opportunities for continuing judicial education to probate judges and related personnel. Its membership presently consists of about 575 Probate Judges from 28 states. The College is open to all Probate Judges and retired Judges. Associate membership is open to court personnel and to lawyers interested in probate law and reform.

The College generally has two national meetings per year to provide educational programs. The educational programs include oral presentations and written materials to the Judges attending. The College is also active in the area of publications relating to probate law. The College produces a quarterly publication focusing on recent developments and matters of current interest to the Judges. In addition, the College has had affiliations historically with the Boston University School of Law in support of the

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity, other than *amicus curiae*, made a monetary contribution to the preparation or submission of this brief. To the extent not previously filed, copies of the relevant letters of the parties consenting to the filing of this brief are lodged herewith.

Probate Law Journal, and more recently with the Quinnipiac Law School in support of the Quinnipiac Probate Law Journal. Members of the College have both attended and taught probate specialty courses at the National Judicial College in Reno, Nevada. Administrative support for the College is provided by the National Center for State Courts in Williamsburg, Virginia.

Members of the College have participated actively in guardianship reform and in the development of new uniform state laws in the probate area. In 1991 the College, collaboratively with the National Center for State Courts, established a Commission on National Probate Court Standards. This Commission produced a set of Standards (with Commentary) in the areas of general administration of probate courts, administration of decedents' estates, and protective proceedings (guardianships and conservatorships).

One of the activities of the College is the annual presentation of the William Treat Award for distinction in the probate area. The recipient is either a Judge, a practicing lawyer, or an academician. In 1983 the recipient of the Treat Award was The Honorable Sandra Day O'Connor of this Court.

The College wishes to disclose that one of its members, the Honorable Mike Wood, one of the Probate Judges in Harris County, Texas, was the Trial Judge in the Marshall Estate state court proceedings. Judge Wood was not involved in the decision of the College to file this *amicus* brief nor was he involved in the preparation of the brief or in determining the position taken by the College.

STATEMENT

The basic facts of the case and the history of the state and federal court proceedings below are as follows. The factors that seem most relevant to the College on the jurisdiction issues include the following:

1. Vicki Lynn Marshall aka Anna Nicole Smith invoked the jurisdiction of the Harris County Texas Probate Court both prior to and after the death of J. Howard Marshall, II challenging his estate plan and suing his son, E. Pierce Marshall, for tortious interference with expectancy of gifts both inter vivos and post mortem. She continued to participate in the probate proceedings following J. Howard Marshall, II's death.

2. The Harris County Texas Probate Court is a court of broad general jurisdiction over probate and probate-related matters.

3. While the state court probate action was proceeding Vicki Lynn Marshall filed for bankruptcy in the Federal Bankruptcy Court and asserted the same tort claim against E. Pierce Marshall that she was already pursuing in the Texas Probate Court.

4. The Bankruptcy Court at one point enjoined further proceedings in the Texas Probate Court (although this action was reversed by the U.S. District Court). Following a jury trial, the Texas Probate Court validated the decedent's estate planning instruments and dismissed the tortious interference claim.

5. Despite the pendency of the Texas Probate Court proceeding, the Federal District Court ruled on the governing instrument's validity

and the tortious interference claim, all in a manner contrary to the ultimate state court rulings.

6. It was the District Court ruling that the 9th Circuit vacated under the "probate exception" to federal jurisdiction.

SUMMARY OF ARGUMENT

The College will devote a substantial portion of its Brief to providing a summary of contemporary probate law and practice in the state courts with respect to the general succession (probate and non-probate) of a decedent's assets. This will illustrate the fact that distinctions between traditional "pure" probate of wills and administration of probate estates and other means of succession, including revocable trusts, are not meaningful in many respects; that at a minimum the probate exception should be applied to cases, such as this one, that involve determinations as to creation, validity, funding and administration of trusts which are will substitutes; and further that the statement of the probate exception in *Markham v. Allen*, 326 U.S. 490 (1946), should be clarified in its modern context.

The College will comment on broader approaches suggested by some of the current Court decisions, including an analysis of both tortious interference cases and trust cases as appropriately subject to the probate exception.

Finally, it is the position of the College, consistent with the 9th Circuit's view, that the probate exception should be applied in bankruptcy cases as well as diversity

and federal issue cases, at least in cases where the issues common to probate and bankruptcy have been, are, or may be litigated in state probate court proceedings.

Finally, the College suggests the adoption of a pragmatic approach focusing on the question of what issues, as a matter of policy, experience and efficiency, should be left to state probate court jurisdiction.

ARGUMENT

A. PROBATE COURTS, LIKE THE HARRIS COUNTY PROBATE COURT, HAVE BROAD JURISDICTION AS TO PROBATE-RELATED MATTERS.

Although the jurisdiction of probate courts around the country is not identical, there is a common pattern. Probate courts in the United States historically were created by the several states. They carried forward in this country the probate and equity jurisdiction of ecclesiastical and chancery courts in England. As noted by Judge Posner in *Dragan v. Miller,* 679 F.2d 712 (7th Cir. 1982), the historical record is not clear. Nevertheless, the original and traditional jurisdiction of probate courts certainly included the admission of wills to probate (thus, inherently, the determination of testamentary intent) and the appointment of a fiduciary.

There is some variation in the source of jurisdiction of state probate courts. Some derive jurisdiction from the state constitution; others from state statutes; still others from a combination of the two. Some have family law as well as probate jurisdiction. All have guardianship and conservatorship jurisdiction over the assets and affairs of

minors and incapacitated persons; some exercise jurisdiction over civil commitments of the mentally ill.

There are variations in the names of courts exercising probate jurisdiction. Most are called probate courts; in New York probate jurisdiction is in a Surrogate Court. In some states a separate probate court is granted exclusive probate jurisdiction within its geographical confines. Examples would be the Denver Probate Court, the statutory probate courts in Texas, and the various surrogate courts. In most states the probate court is a division of the highest general jurisdiction trial court and has full probate jurisdiction. In Colorado, for example, designated divisions of the District Courts outside of Denver exercise probate jurisdiction to the same extent as the Denver Probate Court. In some states original jurisdiction may be in a local court of inferior jurisdiction. Often these courts handle the routine, non-contested aspects of probate, usually with appeal or trial de novo to the highest court of general probate jurisdiction.

As used in this Brief a probate court will be considered to be a trial court of general jurisdiction in which probate matters are vested by the state constitution or state statute.

B. IN THE CONTEXT OF "INTERFERING WITH PROBATE," STATE PROBATE STATUTES HAVE A SERIES OF DISTINCT BUT RELATED FUNCTIONS WHICH APPLY TO NON-PROBATE TRANSACTIONS AS WELL AS TO "PURE" PROBATE.

Historically, probate in its narrow sense meant a proceeding to determine the validity of an instrument

purporting to be a will. This was "probating a will." In a broader sense probate was descriptive of the entire process by which a will was determined to be valid and a fiduciary was appointed to administer and distribute the decedent's estate. This was "probating an estate."

In attempting to articulate and apply the probate exception to federal jurisdiction, federal court decisions often focus on whether the federal jurisdiction and action will interfere with the probate process. *See, e.g., Georges v. Glick*, 856 F.2d 971, 974 (7th Cir. 1988).

We know from personal experience and anecdotal evidence that, in today's financial world, a relatively small portion of decedents' assets pass through the traditional probate process. Substantial assets pass at death outside the will in joint tenancy and tenancy by the entirety; and under life insurance and annuity beneficiary designations. It is likely that more wealth passes by retirement plan beneficiary designation than under wills; and there is increasing use of trusts as probate avoidance devices and as transfer tax minimization devices. *See* generally, John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev. 1108, 1125-40 (1984).

It would be simplistic to characterize these kinds of transfers as non-probate transfers outside of the probate exception to federal court jurisdiction. They are a part of a wealth-transfer process which involves the jurisdiction of local probate courts in a variety of areas, common to both probate and non-probate transfers, such as adjudications regarding:

a) creditor rights;

b) family protection (exempt property and family support allowances);

c) transfer tax apportionment and collection;

d) spousal protection – statutory elective share;

e) revocation, as a matter of law, under probate statutes of non-probate transfers (mortmain statutes, revocation by dissolution of marriage, statutes disqualifying the succession by a felonious heir, and the like);

f) creation of protective arrangements for minor and incapacitated beneficiaries of both probate and non-probate transfers); and,

g) in a variety of contexts, determination of the testamentary intent of a decedent.

1. DISTINCT FUNCTIONS OF THE PROBATE PROCESS.

Discrete functions of probate administration process include:

(a) *Determination of the validity of the will or other donative instrument or transfer.* Sometimes a will is admitted to probate simply to perfect the marketability of title to real estate or to evidence the exercise of a power of appointment without the appointment of a personal representative. This function is, however, usually the first step in the process of administration.

(b) *Appointment of a personal representative.* The second common function of the probate process is the

appointment of a fiduciary to be responsible for the administration of the estate. The fiduciary (generically, "personal representative") has direct control over the probate assets (*i.e.*, those titled in the sole name of the decedent which pass under his or her will). The personal representative will, however, by statute or by the nature of his or her fiduciary duties, have additional responsibilities over a wide range of non-probate assets including, in appropriate cases, pre-death gifts and other transfers.

(c) *Marshaling of assets.* A traditional function of the probate process is the "administration" of the estate, that is the marshaling of assets, payment of expenses, and satisfaction of third-party interests, including taxing authorities and family support. This is normally the responsibility of the personal representative. The representative has fiduciary duties to the beneficiaries, and to some extent, to third party interests. While it is often claimed that certain non-probate transfers "avoid probate" that notion is simplistic and not accurate in all cases. For example, the personal representative generally has responsibility to see (1) that the decedent's creditors are paid; (2) that the decedent's federal and state estate taxes are paid; (3) that state statutory exempt-property and support allowances are provided for the benefit of the decedent's family; and (4) the statutory elective share rights of the surviving spouse are facilitated. To a greater or lesser degree state probate codes and the federal transfer tax statute give the personal representative rights against non-probate transferees to satisfy these third – party interests.

(d) *Distribution of net assets.* As the administration of the estate nears its end, the probate process has mechanics to facilitate the distribution of the net remaining

assets. As to probate assets the action of the personal representative (and hence the jurisdiction of the probate court) is clear.

As to non-probate interests, the jurisdiction of the probate court is often invoked by petition to clarify any questions as to who is entitled to distribution (e.g., adjudicating the sequence of deaths under the Uniform Simultaneous Death Act or otherwise to determine succession to joint tenancy interests; and interpretation of class gift language under trust and life insurance policies, including the issues of later-born class members, natural children, and adoptees).

In this area of "non-probate" interests, an issue commonly adjudicated by the probate courts is the determination of the nature of joint tenancy bank accounts. For example, did the decedent add the name of a friend or family member to his or her bank account with the intent to make a gift effective at death, or was the intent to create a "convenience" account – that is, to add a name for the limited purpose of payment of the decedent's bills?

In connection with the distribution function of estate administration, a problem commonly encountered is that the donee is an incapacitated person. Sometimes in wills and trusts there is facility-of-payment language authorizing the fiduciary to make a distribution to a third party for the benefit of the beneficiary. Often there is not. Where there is no language the probate court has jurisdiction to effectuate the transfer by creation of a conservatorship or, in the case of smaller amounts, by authorizing of a transfer to a third party as custodian under the Uniform Transfers to Minors Act or the Uniform Custodial Trust Act. These incapacity issues also arise commonly in connection

with non-probate transactions, and the probate court will have jurisdiction to authorize a protective arrangement.

(e) *Closing of estate and protection of the personal representative and distributes.* The final function of the probate process is to effect a "closing" of the estate. There are statutes of limitation designated to provide finality in the administration and distribution of assets, and in particular to protect both the personal representative and distributees from third party claims (or the claims of other beneficiaries).

We have chosen to illustrate the operation of the probate process and its impact on both probate and non-probate assets by reference to several uniform state laws. Primary is the Uniform Probate Code, substantially enacted in about 18 states, with portions of its administrative and substantive law provisions enacted in a majority of the remaining states.

2. STATE PROBATE STATUTES SUCH AS THE UNIFORM PROBATE CODE COVER NON-PROBATE TRANSFERS (INCLUDING TRUSTS) AS WELL AS PROBATE ASSETS.

The effect of the Uniform Probate Code (UPC) on non-probate interests is reflected in the following provisions.

Article I, § 1-102(b)(2) provides that one of the purposes of the UPC is "to discover and make effective the intent of a decedent in distribution of his property."

Article II deals with intestacy rules and donative transfers. Parts 2, 3, and 4 deal with protection of the surviving spouse and children and reflect a mix of both probate and non-probate assets. Section 2-201 et seq.

dealing with the elective share of the surviving spouse will be discussed at some length below.

Sections 2-301 and 302 deal with the pretermitted (or omitted) spouse and children. The concept is that an intestate share should be provided unless there is evidence that the decedent provided for the family members by transfers *outside of the will* that is by looking to the nature and extent of non-probate transfers.

Section 2-405 deals with funding of exempt property and family support allowances. The personal representative has discretion to establish a family allowance up to a set monetary cap. An interested party may petition the Court for an allowance other than what the personal representative determined or may have determined; this commonly takes into account the amount and receipt of non-probate transfers to the family members.

Article II, Part 6 of the Code provides for rules of construction applicable only to wills; and Part 7 provides rules of construction applicable to wills and other governing instruments (such as revocable trusts, annuities, life insurance, retirement benefit designations).

Rules common to wills and other governing instruments include:

> Section 2-702 – 120 hours survival requirement (applicable to wills, revocable trusts and joint tenancy transfers); § 2-703 – recognition of choice of law; § 2-704 – requirements for exercise of powers of appointment; § 2-705 – construction of class gifts; § 2-706 – alternate taker where non-probate beneficiary fails to survive; § 2-707 – trust future interests; alternate taker when beneficiary fails to survive (including class gifts);

> § 2-708 – construction of class gifts to "descendants," "issue," and the like; and § 2-709 – distribution under class gifts "by representation," "per capita," and "per stirpes."

Part 8 contains general provisions concerning both probate and non-probate transfers: § 2-803 deals with the effect of homicide by a successor on various transfers (the felonious-heir rule or "slayer statute"); § 2-804 deals with revocation by law of donative provisions for the spouse in the event of dissolution of marriage.

Article II, Part 11 deals with disclaimer of interests, including non-probate joint tenancies and powers of appointment. §§ 2-1105, 1106, 1107 and 2-1110.

Article III of the UPC deals with probate of wills and administration. Section 3-105 deals with subject-matter jurisdiction.

Under § 3-709 the personal representative has the right to and shall take possession or control of the decedent's personal property (with an exception regarding possession of certain tangible personal property and real estate which may be left in the possession of a devisee subject to the representative's retained powers) as follows:

> The personal representative shall pay taxes on, and take all steps reasonably necessary for the management, protection and preservation of, the estate in his possession. *He may maintain an action to recover possession of property or to determine the title thereto.*

(Emphasis added).

Article III, Part 8 deals with creditor claims. Section 3-803 provides the personal representative with the ability

to obtain the benefit of a short, four-month, limitation period by publication against known creditors. In addition, there is a short one-year self-executing bar against pre-death claims which is designed to carry out one of the core purposes of the Probate Code, that is to "promote a speedy and efficient system of liquidating of the estate of the decedent and making distribution to the successors." § 1-102(b)(3).

Purportedly free-standing, plaintiff-versus-defendant lawsuits for tortious interference with gift, contract or inheritance may be motivated by an attempt to circumvent a short non-claim period where the one-year period has passed and the plaintiff has failed to challenge the will or to perfect a creditor's claim.

Article III, Part 9A provides for apportionment of estate taxes. Absent governing instrument language to the contrary, estate taxes are apportioned pro rata against the value of the assets which generate the tax, with the transferee, such as a spouse or a charity, given the benefit of any available deductions. The tax-apportionment statute applies to probate assets, non-probate transfers, and to certain pre-death completed gifts. Under the Internal Revenue Code the primary responsibility for collecting and paying the taxes is placed on the personal representative, and § 3-9A-109 gives the personal representative the right of contribution or reimbursement from non-probate transferees.

Article VI of the Code deals with non-probate transfers on death. Section 6-101 validates non-probate transfers even though they may not have been executed with the formalities (witnessing and acknowledgment) of the

statute of wills. This includes non-probate transfers on death of interests:

> . . . in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature . . .

§ 6-101.

Section 6-102 deals with the liability of certain non-probate transferees with respect to both creditor claims and statutory allowances.

Article VII of the Code deals with trust administration. In § 7-201 it is provided that the Probate Court has exclusive jurisdiction of proceedings brought by interested parties concerning the internal affairs of trusts. Proceedings which may be maintained in this section are those including the administration and distribution of trusts, the declaration of rights, and the determination of other matters involving trustees and beneficiaries or trusts. Section 7-204, however, provides concurrent jurisdiction of litigation, not involving the internal affairs of trusts, but rather involving trusts and third parties, including actions by or against creditors or debtors of trusts and other actions and proceedings involving trustees and third parties.

This pattern of jurisdiction (exclusive jurisdiction in the Probate Court regarding internal affairs of trusts and concurrent jurisdiction regarding actions by or against third parties) is also provided in Uniform State Laws regarding trusts (Uniform Trust Code §§ 201, 202, 203).

The same distinction is reflected in the Federal cases which apply the probate exception to cases regarding all internal affairs of estates and trusts but not necessarily to third party actions where the estate or trust is a plaintiff or defendant. *See, e.g., Breaux v. Dilsaver*, 254 F.3d 533 (5th Cir. 2001).

3. SPECIAL AREAS OF PROBATE COURT EXPERIENCE.

In connection with the operation of the probate process there are a number of areas where state probate courts have developed special expertise in determining the essential nature of an action and the extent of authority of a fiduciary. These include the following:

(a) Whether a remedial action against a fiduciary is equitable in nature, even though couched as a "legal" negligence action affecting:

1) The applicable statute of limitations; and

2) An equitable surcharge remedy versus such legal remedies as punitive damages.

(b) Whether acts of a fiduciary are essentially done in his or her individual versus fiduciary capacity.

(c) Whether a special administrator should be authorized to expend estate funds to investigate and rescind questionable pre-death transactions of the decedent.

(d) Whether issues involving the validity of several wills should be combined in a single proceeding or in a series of separate proceedings.

(e) Whether questionable pre-death transfer actions should be combined with will contest actions where the issues (of capacity and undue influence) and the parties are substantially the same.

(f) Whether, under some state elective-share statutes, non-probate transfers are fraudulent as to the marital interest and should be disregarded.

(g) Whether a person has or lacks legal capacity for various purposes including testamentary capacity regarding wills and trusts, donative capacity regarding gifts, contractual capacity, and functional capacity in guardianships.

To illustrate the nature of state court probate jurisdiction and experience, the College provides two examples. In each it seems sensible and appropriate for the federal exemption to apply and for the issues to be resolved by the state probate court.

Illustration No. 1: Suppose the case of A, an elderly widower. His sole heir at law is his nephew B who lives in another state. A's support group consists of his neighbors who are members of his church. At A's request B moves into A's house. B maintains that there was an understanding (nothing in writing) that at A's death B would receive his estate (or at least his house). It appears to neighbor C that A and B are not getting along and that B may be abusing A. A executes a will naming C as personal representative and beneficiary, and gives C a power of attorney. B's name had been added to A's bank account. B is now replaced by C. A dies and B is unhappy about being excluded. B's attorney advises that he might have the following rights and remedies:

1. Contest A's will based on lack of capacity or C's undue influence. (Classic probate in rem situation).

2. File a claim against A's estate for breach of contract to make a will or devise.

3. File a claim against the estate for the house based on promissory estoppel.

4. File a claim against the estate for the value of services provided based upon quantum merit.

5. Commence a tortious interference action against C regarding B's inheritance rights as heir at law and regarding B's contractual rights.

6. Seek to impose a constructive trust against A's assets in C's hands.

Under each theory the parties are the same: B and C. The assets involved are the same; and the remedy under each would be to benefit B at C's expense. Formalistically, the tortious interference actions are free-standing plaintiff-versus-defendant actions; the balance are traditional probate actions.

This range of actions seems to the College to be essentially probate in nature (certainly in the basic sense of determining and carrying out testamentary intention, in accordance with one of the chief purposes of the UPC) and it does not seem appropriate for B to be able to opt for federal jurisdiction (assuming diversity and amount in controversy) by the characterization or labeling of his action in tort. In the College's view, such an option for B would constitute a privilege, in essence, to "forum shop."

Illustration No. 2: Another case which may be useful in characterizing what is a probate action is the determination of the statutory elective share of a surviving spouse. Historically the spouse's election was "against the will" and involved only "pure" probate assets. From a policy perspective it became apparent that providing a forced share of a decedent's estate for the surviving spouse was easily avoided, either intentionally or unintentionally, by having substantial assets pass to third parties outside of probate (say by diversion through the creation and funding of a revocable trust with provisions for beneficiaries other than the spouse.)

The modern statutory solution takes into account the realities of wealth transmission. Uniform Probate Code § 2-201 et seq., for example, defines a "net augmented estate" which consists of:

a. The net value of the "pure" probate estate; plus

b. Transfers to a surviving spouse by revocable transfers from the decedent (i.e., joint tenancy, revocable trust, life insurance, annuity beneficiary designation, exercise of power of general power of appointment and the like); plus

c. Similar non-probate transfers to parties other than the surviving spouse; plus

d. By viewing marriage as a kind of economic partnership and thus including the value of the surviving spouse's own separate assets as part of the computation.

When the value of the augmented estate is computed, the share of the spouse will be a percentage thereof (similar to a pension-vesting schedule) with a spouse entitled to 50% in a long-term marriage. The value of the spouse's percentage is then reduced by the combined value of the assets passing to the spouse under the decedent's will, plus the non-probate transfers to the spouse; plus the spouse's own assets. If there is a shortage, then the spouse is entitled to pro rata contribution from the other donees or transferees, both under the will and under non-probate transfers. To complicate the equation, some completed pre-death gifts are included both in the decedent's augmented estate and in the value of the spouse's separate estate (e.g., those gifts made in the years close to death in excess of the federal gift tax annual exclusion).

This process involves complex issues of characterization and valuation of both the decedent's and spouse's assets and may involve a series of hearings over a multi-year time frame. This would appear to be a probate matter exclusively suitable for state probate court resolution under the probate exemption.

A narrow reading and application of the probate exception might not, however, produce this result. The design of the Uniform Probate Code elective share proceedings creates what is, in effect, a plaintiff-versus-defendant action. The narrow probate administration process produces only one element of the overall elective share calculation, that is the determination of the decedent's net probate estate. Procedurally, the spouse brings an action against all third parties (probate and non-probate beneficiaries of the decedent) from which he or she seeks contribution. Technically the personal representative of the estate is not a party to the elective share

proceedings (except perhaps to facilitate contributions from probate beneficiaries under the will).

It seems to the College that a narrow reading of the probate exception (as argued by the Petitioner) would clearly produce the wrong result both in the elective share case and in the case of B against C and that state court jurisdiction is appropriate and preferable in each.

C. IN GENERAL THE PROBATE EXCEPTION SHOULD APPLY BOTH TO TRUSTS WHICH ARE WILL SUBSTITUTES AND TO TORTIOUS INTERFERENCE ACTIONS.

1. WILLS VS. TRUSTS.

At minimum the federal probate exception should cover cases involving the validity of trusts which are will substitutes and the administration of revocable trust estates. Such will substitutes may involve either revocable or irrevocable trusts.

The trend in the cases and statutory law reform during the past several decades has been to eliminate distinctions between probate administration and the administration of trusts which are will substitutes. Most of the focus has been on revocable trusts and is sometimes described as "leveling the playing field" between wills and trusts.

As stated in the Reporter's Notes to the Uniform Trust Code, "The basic policy of this Article [Article 6 – Revocable Trust] and of the Uniform Trust Code in general is to treat the revocable trust as the functional equivalent of a will." As such, the revocable trust also constitutes an

explicit expression of the settlor-decedent's testamentary intent.

Historically there was some authority, in Massachusetts in particular, for the proposition that a decedent's revocable trust assets were not subject to his or her creditor claims absent governing language to the contrary. This is no longer the case, and the modern rule is reflected in the Restatement (Third) Trusts, § 25 Comment e, (2003), and the Uniform Trust Code, § 505.

Historically, there was also a question as to whether the capacity to execute a trust (a two-party document looking in some respects like a contract) would be the same as to execute a will. The modern authorities provide that the test is the same for each. Uniform Trust Code § 601, Restatement (Third) Trusts § 11(1) (2003).

Historically, trusts, as two-party instruments, were subject to the contract rules for reformation to correct a mistake; but wills, being one-party instruments, were not reformable. Again, the modern authorities treat both documents as reformable. Restatement (Third) of Property: Donative Transfers § 12.1 (2003).

In the tax area, historically all trusts were on calendar years for income tax purposes, while an estate could make a beneficial election to select a non-calendar fiscal year (so as to obtain flexibility in the planning of distributions). Now revocable trusts may elect to be taxed as if they were part of a probate estate, thus obtaining the same benefit. I.R.C. § 645(a). The wide range of benefits is detailed in Steve R. Akers, *Worth the Effort Even Beyond the Grave – an Update of Post-Mortem Tax Planning Strategies* § 803.6, p. 8-47, 37 Heckerling Institute on Estate Planning 2003, Lexis Nexis Matthew Bender.

Regarding the surviving spouse's elective share, historically, as indicated above under state law the elective share of a surviving spouse against the will could be frustrated by placing substantial assets into a revocable trust (which assets were outside of the probate estate). The modern cases and statutes reverse this and provide that the decedent's revocable transfers (including revocable trusts) are subject to satisfaction of the surviving spouse's elective share. *See, e.g.*, Uniform Probate Code § 2-201 et seq.

2. TORTIOUS INTERFERENCE.

Lindberg v. U.S., 164 F.3d 1312 (10th Cir. 1999) states the classic elements of tortious interference with an expectancy of inheritance as provided by the Restatement (Second) of Torts, Section 774B, as follows:

a) A valid expectancy to inherit;

b) Intentional interference with that expectancy;

c) Independent tortious conduct (such as undue influence, fraud, or deceit);

d) Reasonable certainty that, absent the tortious interference, plaintiff would have received the expectancy; and

e) Damages.

The *Lindberg* case, citing prior 10th Circuit decisions, notes that the plaintiff must show more than a "mere expectancy" or a hypothetical or abstract expectancy. Instead, that plaintiff "must show a tangible basis to assert a prospective inheritance such as being an heir at law of the decedent" or a residuary devisee of a previous

will or other testamentary document. *Lindberg, supra*, 164 F.3d 1312, 1319.

The valid expectancy to inherit seems inherently a state court probate issue. If the plaintiff must establish a tangible basis for the expectancy, there must be a threshold determination of the plaintiff's standing, either as an heir at law under intestacy or a testacy right under a will. Further, this "valid expectancy" will depend upon the testamentary and donative intent of the decedent. Logically the decedent either had an intent as expressed in his will (or trust), or he had some other intent which was tortiously interfered with. An element common to contested will (or trust) cases and to tortious interference cases is the central issue of intent.

Under any of the several Circuit Court tests for the probate exception it appears that attempts to litigate tortious interference with inheritance cases in federal courts should be subject to the probate exception.

D. THE NATIONAL COLLEGE OF PROBATE JUDGES SUGGESTS THAT THE COURT ADOPT THE APPROACH OF *DRAGAN V. MILLER*.

In the view of the College, the above discussion of the typical state court probate jurisdiction, the experience of probate judges in the classification of actions, and the nature of modern estate administration, altogether, suggest the following conclusions:

1. A standard which limits the probate exception to the admission of wills to probate and the administration of probate estate assets is too narrow.

2. A more practical approach should be taken to conform the realities of modern probate to the purposes of the probate exception.

3. From the perspective of practicing probate judges, of the several approaches taken by the Circuit Courts, the ancillary-to-probate action test as articulated by the 7th Circuit in *Dragan v. Miller*, 679 F.2d 712, 715 (7th Cir. 1982), is preferable.

Dragan v. Miller, supra, was a case where, following the administration and distribution of an estate, a third party sought to impose a constructive trust on estate asset in the hands of the devisee (on a tort theory involving undue influence).

The Court in *Dragan* proposed a "practical approach" based the holding of this Court in *O'Callaghan v. O'Brien*, 199 U.S. 89 (1905), where this Court applied the probate exception not only to matters of pure probate in the strict sense of the word, but also to proceedings "ancillary to the original probate, ..." The Court determined that the constructive trust issue was "ancillary" to probate, in the practical sense that allowing it to be maintained in federal court would impair the policies served by the probate exception.

The policy goals underlying the probate exception as articulated in *Dragan* were summarized and applied by the 7th Circuit in *Storm v. Storm*, 328 F.3d 941 (7th Cir. 2003), to a case of alleged tortious interference with an inheritance expectancy. In *Storm*, the Court stated:

> In *Dragan* and subsequent cases, we identified several practical bases for the exception. One practical reason for excluding probate matters

from federal jurisdiction, albeit not the strongest one, is to encourage legal certainty – that is, to ensure that the outcomes of probate disputes will be consistent by limiting their litigation to one court system, rather than providing disputants the choice between two. *Dragan*, 679 F.2d at 714. A second goal is to promote judicial economy. *Id.* The process of determining and effectuating a decedent's testamentary wishes will generally begin in a state court. "If the probate proceeding thus must begin in state court, the interest in judicial economy argues for keeping it there until it is concluded." *Id.* "By restricting probate matters and will contests to state courts, questions as to a will's validity can be resolved concurrently with the task of estate administration." *Georges*, 856 F.2d at 974. This serves to preserve the resources of both the federal and state judicial systems and avoids the piecemeal or haphazard resolution of all matters surrounding the disposition of the decedent's wishes.

We have referred to "relative expertness" as another practical reason for the exception. *Dragan*, 679 F.2d at 715. Because state courts have nearly exclusive jurisdiction over probate matters, state judges vested with probate jurisdiction develop a greater familiarity with such legal issues. A final practical reason for having an exception is to avoid unnecessary interference with the state system of probate law. *Georges*, 856 F.2d at 974. This reason is actually a consequence of the other rationales: if state courts have the exclusive task of probating a will, and thus develop the relative expertise to do so (including the expertise to deal with all matters ancillary to probate), then federal court resolution of such

> matters is unlikely to be more than an unnecessary interference with the state system.

In *Storm*, the plaintiff, Brion M. Storm, argued that the probate exception should not apply for two reasons. First was that the case was a tort action rather than a will contest, and secondly that the case involved the provisions of a trust rather than a will. The Court dismissed both of these arguments, noting that mere labels, whether an action is styled as a tort action or a will contest, should not be decisive in the probate-exception analysis.

With respect to the "tort" label, the Court found:

> While Brion phrases his action as one involving tortious interference with his inheritance expectancy, the practical effect of his lawsuit would be similar to that of a successful will contest: the terms of the final, allegedly invalid testamentary instruments would essentially be bypassed, while Brion would receive, as damages, the assets he would have otherwise been entitled to under what he says are Evelyn's actual will and trust.

Storm, supra, 328 F.3d 941, 945.

E. UNDER THE FACTS OF THIS CASE THE PROBATE EXCEPTION SHOULD APPLY TO THE BANKRUPTCY ACTION.

The concept of federal exception is beneficial in terms of its basic policies and it should be applied broadly rather than narrowly.

The exception applies easily in federal question cases since the deference to a state court with general jurisdiction will produce a full adjudication of the probate-related issues (even where the state court is applying federal law).

In the bankruptcy context if there are full-jurisdiction state court proceedings which are completed, pending, or available then there should be deference to the state court proceedings so as to avoid interference with them.

In the Marshall Estate there were state probate proceedings pending, encompassing an essential determination of J. Howard Marshall, II's testamentary intent, and the actions of the Bankruptcy Court and the Federal District Court improperly interfered with the state court proceedings.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the 9th Circuit in this case.

Respectfully submitted,

JAMES R. WADE
Counsel of Record
WADE ASH WOODS HILL
& FARLEY, P.C.
360 South Monroe Street, #400
Denver, Colorado 80209
303-321-0653

Attorney for Amicus Curiae